Filed 4/5/04 P. v. Gutierrez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE JESUS GUTIERREZ, Defendant and Appellant.	B163632 (Los Angeles County Super. Ct. No. TA063723)

Appeal from a judgment of the Superior Court of Los Angeles County. Victoria M. Chavez, Judge. Modified and affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, John R. Gorey and Victoria B. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Jesus Gutierrez appeals from the judgment entered upon his conviction by jury of second degree murder and three counts of willful, deliberate and premeditated attempted murder, all four counts committed with the personal and intentional discharge of a firearm, causing death or great bodily injury. (Pen. Code, §§ 187, subd. (a), 664/187, subd. (a), 12022.53, subds. (b)-(d).) It was found as to each of the attempted murder counts that appellant committed the crime for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b).)[1] He was sentenced to 15 years to life and to three consecutive terms of life in prison, with firearm use and criminal street gang enhancements.

Appellant contends that (1) the trial court erred in admitting "dog scent"/tracking evidence without establishing its admissibility under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); (2) the trial court erred in refusing his pinpoint instruction on dog scent evidence; (3) the trial court erred in admitting evidence of his prior possession of a firearm similar to one that might have been used in these offenses; (4) the trial court erred in failing to sanitize the prior conviction of a defense witness for impeachment purposes and in admitting evidence of the witness's service of a prison term; (5) the trial court erred in admitting portions of a jailhouse conversation in which appellant participated; (6) imposition of a section 12022.53, subdivision (d) enhancement on the murder count violated section 654 and principles of merger; and (7) imposition of a 10-year criminal street gang enhancement under section 186.22, subdivision (b)(1) was erroneous.

We modify the judgment with respect to the criminal street gang enhancements and otherwise affirm.

FACTS

Lamont Saleem and Paul Engle were members of the Victoria Park Crips gang, a predominantly Black gang. Appellant was a member of the Victoria Park Locos gang (hereafter "Locos"), a predominantly Hispanic gang that shared the same territory. At approximately 6:15 p.m. on February 1, 2002, Engle was standing with Saleem on the corner of East 186th Street and Billings Avenue in Carson. Appellant, who was wearing

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

"all black" and a beanie, suddenly appeared and fired a handgun three times at Saleem with what appeared to be a nine millimeter gun. Appellant then fired several times at Engle as Engle tried to flee. Appellant attempted to fire a shot into the back of Engle's head as Engle fell, but Engle grabbed the gun and the shot hit his neck instead. Saleem sustained one gunshot wound, and Engle sustained six gunshot wounds. Both victims were able to talk to a deputy sheriff after the shooting, but each let the deputy know he did not want to provide any information regarding the shooter.

Donald Nelson, a resident of East 185th Street, heard the gunshots and saw appellant running north on Billings, away from East 186th Street. He then saw Engle lying injured on the street. Nelson had known appellant for five or six years and had never had any problems with him.[2] Nelson testified that earlier that day, he had observed a large group of Locos meeting at the home of a member of the Locos gang. Nelson spoke to the police that night. He seemed to be "pretty evasive" and did not identify appellant as the shooter. He gave a description of the shooter, stating that he was a young person or juvenile, five feet seven inches tall, 150 to 160 pounds, wearing a black jacket, pants and beanie. He acknowledged that when he spoke to detectives he told them he had not seen the face of the man he saw running on February 1. At trial, he testified that to have identified appellant at the time would have been snitching.

At approximately 10:00 p.m. on February 2, 2002, the day after the shootings of Engle and Saleem and Nelson's conversation with the police, Nelson was outside his East 185th Street home drinking and smoking marijuana with several friends, including Thomas Wood. He was not drunk or loaded. Appellant appeared, and as Nelson watched, appellant shot Wood in the face. Appellant then fired additional rounds at Wood, inflicting 15 gunshot wounds which resulted in Wood's death. Nelson rolled under his vehicle. Appellant turned toward Nelson, who briefly made eye contact with

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[2] Nelson testified that he had been a member of the Victoria Park Crips but claimed he left the gang in 1997. He acknowledged that he had sustained a conviction of residential burglary in 1997.

him. Appellant then shot Nelson 13 times. Nelson heard the sound of two different weapons being fired. Appellant's gun was large and he held it with two hands. As appellant walked away, Nelson noticed his boots. He did not see a second shooter. Nelson was taken to a hospital, where he identified appellant as his and Wood's assailant as well as the person he had seen at the time of the shooting of Engle and Saleem the day before. He subsequently identified appellant from a photographic lineup. He identified appellant at trial, stating he had no doubt appellant was the person who shot him and Wood.

Veronika Hayes, who lived at 106 East 189th Street, heard gunshots coming from across a footbridge spanning a nearby flood control channel at approximately 10:00 p.m. on the night of Wood's murder. About five minutes later she saw a slow-moving vehicle stop in the middle of the street in front of her house. The driver called out, "Hurry up" and two men, one carrying a long weapon, came across the footbridge and got in. She did not know if the other man had a weapon and could not identify any of the individuals she observed.

Neither Engle nor Saleem identified appellant in the early stages of the investigation. Engle told detectives he could not identify the shooter and did not identify appellant from a photographic lineup, although he told detectives he recognized appellant's photograph. He explained at trial that he did not want to be shot again. Saleem did not identify appellant in several subsequent interviews with police and did not identify appellant from a photographic lineup, although he smiled when he saw appellant's photograph. He testified at trial that he was at his grandmother's house at the time and she did not want him to get involved, fearing that her house would be shot at, and he did not want to become known as a snitch. Detective Richard Tomlin, one of the investigating officers, testified that in a gang-related shooting, victims and witnesses rarely "step forth."

A few months later, while Saleem was in custody in an unrelated matter which carried a potential life term under the three strikes law because he had two prior residential burglary convictions, he contacted Detective Tomlin and asked if Detective

Tomlin could help him in his own case. Detective Tomlin told him he could not do anything and if anyone could it would be up to the district attorney. In a subsequent interview, Saleem informed Detective Tomlin that appellant was his assailant and identified appellant from a photographic lineup. Saleem never spoke with the prosecutor, and he was told that his testimony in appellant's case would have no bearing on his case. During appellant's trial, Saleem was placed in a holding cell with appellant, and appellant asked whether Saleem was going to snitch. As appellant left the cell, he stated, "Don't think you can't be touched, bitch." At trial, Saleem testified he was 100 percent sure appellant was the shooter, stating he had known appellant a long time and that he saw appellant shoot him.

A few days before Engle testified in appellant's case, he saw his name printed on a wall with an X over it and with the word "snitch" printed under it.

Eleven nine millimeter casings were recovered from the scene of the shootings of Saleem and Engle, and 15 nine millimeter casings were recovered from the scene of the shootings of Wood and Nelson. All 26 had been fired from the same firearm. In addition, 18 7.62 caliber casings and one live 7.62 caliber round were recovered from the location of the shooting of Nelson and Wood. The firearms examiner determined that eight of the 7.62 caliber casings had been fired from the same 7.62 caliber firearm, although he could not determine whether or not the other 10 had been fired from the same firearm. In addition, eight bullets were recovered from Wood's body, seven corresponding to a nine millimeter handgun and one a 7.62 caliber consistent with rifle ammunition. The 7.62 by .39-caliber rifle used in the shooting of Wood was an AK-47 or an S.K.S. semiautomatic.

Appellant was arrested on February 7, 2002. Boots similar to those described by Nelson as having been worn by appellant were found in appellant's sisters' home. The boots tested negative for blood. No firearms were recovered from appellant's family residence or his sisters' home.

In an interview with Detective Tomlin, appellant denied involvement in either shooting and claimed he had "stepped back" from gang life four years earlier. He told

Detective Tomlin that at 5:45 on Friday, February 1, 2002, he arrived at a barber shop that a detective testified was a 14-minute drive from where Saleem and Engle were shot. While he was there, his mother called to tell him about the shooting in his neighborhood. Appellant told Detective Tomlin that he then went to his sisters' San Pedro residence, arriving at 7:30 p.m., and that he spent Friday night there. He claimed that while he was there, his friend Luis Ramirez called and told him about the shootings.[3] The evening of the next day, Saturday, February 2, he and his brother Joel went from their sisters' home to Jessica Cherry's San Pedro residence, where his mother called at approximately 11:00 p.m. to tell him about another shooting in his neighborhood. Appellant remained at the Cherry residence until he returned to his sisters' home at 3:00 or 4:00 a.m. on Sunday morning.

Detective Tomlin asked appellant whether he had ever fired a rifle and when was the last time he had done so. Appellant responded that he had fired an S.K.S. assault rifle about a year earlier. Tomlin testified that these weapons, and their ammunition, were unique. Evidence was introduced that in November 2000, over a year before the shootings, two S.K.S. assault rifles were seized during execution of a search warrant at appellant's family's residence and were not returned to appellant's family.

Los Angeles County Sheriff's Detective Dennis Chuck, testifying as a gang expert, indicated that some six months before the February shootings, Joseph Hernandez, who was appellant's best friend and a fellow member of the Locos gang, had been murdered. Although a member of the 190 East Coast Crips gang was charged with Hernandez's murder, Saleem had witnessed the shooting and the Locos believed that Saleem should have prevented Hernandez's death. The Victoria Park Crips and the Locos had tolerated each other, but after Hernandez's murder the relationship between the gangs changed because the Locos believed Saleem "was the suspect" in Hernandez's killing.

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[3] When Ramirez was interviewed in March 2002 by a sheriff's detective, he stated that he had not called appellant on February 1, 2002, to tell him about the shootings.

Detective Chuck believed that the shooting of Engle and Saleem, who were both members of the Victoria Park Crips gang, was in furtherance of the Locos gang as payback for the shooting of Hernandez. Although Nelson, Engle and Saleem had not immediately identified appellant as their assailant, gang members generally do not provide information to the police. Wood was not a gang member. However, Detective Chuck believed that the shooting of Nelson and Wood was also in furtherance of the Locos gang. He explained that since the February 1 shooting of Engle and Saleem did not result in a death, as had the shooting of Hernandez, the February 1 shooting was not deemed to be sufficient retaliation for Saleem's purported responsibility for Hernandez's death. Appellant told Detective Tomlin during his interview that the Locos gang had lost respect because of Hernandez's murder.[4]

On February 7, after appellant was arrested, Detective Paul Fournier obtained a scent sample from appellant by having appellant wipe the palms and backs of his hands on a sterile gauze pad, called a scent pad, and having him seal it in a ziplock baggie. Detective Fournier did not handle the gauze pad. Three hours later, Edward Hamm, a bloodhound handler, and his bloodhound Knight were brought to the scene of the shooting of Wood and Nelson. The scent pad was given to Hamm, who knew nothing about the case. Hamm permitted Knight to sniff the scent pad and gave the command, "'Find him.'" Knight appeared to pick up a scent beginning in front of Nelson's house and led Hamm on a trail that crossed a footbridge over a flood control channel and ended at a location near 107 E. 189th Street, across the street from Veronika Hayes's residence.

Hamm testified that he had worked approximately 140 cases with Knight, 32 of which resulted in confirmations of Knight's accuracy. He had not received any reports that Knight's work was inaccurate. He could not determine how long the scent traced by Knight had been at the location, and he acknowledged that no scientific study indicated that a dog would track a more recent rather than an older scent. He acknowledged that he

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[4] The testimony elicited from Detective Chuck to establish additional elements of the criminal street gang allegations is not set forth here.

had no formal education or training regarding dog scent evidence and there were no scientific studies on the lasting properties of scent or on the reliability of dog trailing or tracking.

Defense evidence established that it took 12 to 15 minutes to walk the path purportedly taken by the suspects after the February 2 shooting. Sheriff's Deputy Mark Wedel had indicated at the time of appellant's preliminary hearing that he considered appellant an inactive member of the Locos gang in February 2002, because he had not seen him in a few years, although by the time of trial he no longer considered him to be an inactive member.

Detective Fournier testified as a defense witness that when he obtained the paper-wrapped gauze pad to use with appellant, he pulled it from the shelf with his ungloved hand. Between February 2 and February 7, 2002, he had been at the location of the shooting of Nelson and Wood, the location where Hayes saw the car pick up the two individuals, and various points in between, including the footbridge.

Dr. Lawrence Myers, a professor of veterinary medicine at Auburn University, Alabama and founder of the Institute for Biological Detection Systems, dealing with detector dogs, testified as an expert witness for the defense. He testified that dog scent tracking has scientific components, but it is not a science. There were no scientific studies concluding what human scent is or how it dissipates or degrades. Dog scent tracking is used to find evidence, but should not "be the evidence."

Dr. Myers described several factors affecting the ability of dogs to accurately trace human scent, including diseases peculiar to animals and the complicated nature of human scent. He testified that Los Angeles County does not impose standards on the dogs used in criminal investigations such as those employed by the federal government, which requires that dogs meet a minimum standard of at least 90 percent proven accuracy. Dr. Myers could not place any degree of scientific certainty on Knight's ability to accurately discern and track human scent or on the reliability of his performance. He stated that "positive feedback," such as a claim of accuracy in 37 out of 140 cases, did not establish that the dog was correct, because it did not involve an empirical test such as

a controlled study. The one study found by Dr. Myers on the subject of the reliability of dog-scent evidence was a Dutch study indicating a high degree of unreliability, with a success rate no greater than 29 percent.

Dr. Myers believed that the use of gauze pads presented contamination issues because they were porous, and it would have been better to use metal or glass as a sample pad. In addition, the trail in this case was five days old and was therefore stale, with a degraded scent; a scent trail more than three days old is less reliable than a more recent one. The trail was also contaminated by its use by other individuals. Dr. Myers testified that the method used here was not scientifically appropriate because the detective who had prepared the scent pads had been at the crime scene and had walked the trail at least twice before Knight was called in.

By way of alibi, appellant's barber testified that, to his best recollection, appellant arrived at his Wilmington barber shop at approximately 6:15 p.m. on Friday, February 1, 2002, appellant's haircut began at 6:30 p.m., and appellant left at 7:00 p.m.[5]

Appellant's sister Julia, a school teacher, and his sister Lucrecia, a school teacher and army reservist, testified that appellant arrived at their San Pedro apartment, which was 15 or 20 minutes from the family home near 182nd Street in Carson, between 7:00 and 7:30 p.m. on February 1, 2002. They further testified that appellant and their other brother, Joel, were at their home during the late afternoon and evening of Saturday, February 2, 2002. The men watched a boxing match on television with appellant's friend, Danny Gutierrez (hereafter sometimes "Danny"), and appellant and Joel left after the match to visit the Cherry twins.

Appellant's friend Danny, who was not related to appellant, testified that on February 2, 2002, he saw appellant and Joel at appellant's sisters' home at 7:30 p.m. They watched a boxing match on television which was over about 9:00 or 9:30 p.m., at which time Danny saw appellant leave with Joel.

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5 The February 1 shooting occurred at approximately 6:15 p.m.

Jaime Cherry ("Jaime") testified that on Saturday, February 2, 2002, appellant and Joel arrived at approximately 9:30 p.m. at the San Pedro house she shared with her twin sister, Jessica Cherry ("Jessica"). Appellant remained there with Joel and with Jessica's boyfriend, Sebastian Martinez, until Jaime and Jessica went out at 11:00 p.m., and he was there when the women returned at 2 or 3:00 a.m. Martinez testified that appellant and Joel arrived at the Cherrys' house between 9:00 and 10:00 p.m. and were there with him until about 4:00 a.m.[6] Martinez testified that Jaime and Jessica went out that evening without him. Jaime acknowledged having told detectives that appellant and his brother arrived in the mid-evening on February 2, but she did not recall stating that they left after an hour and that they failed to return before she left the house at 9:30 p.m.

The prosecutor called Jessica as a rebuttal witness. She testified that appellant was a good friend but was not her best friend. She denied that she or anyone else inside the house said "fuck you" when detectives came to interview her at her home early on the morning of February 11, 2002. She did not answer the door at that time, and the detectives came to her school that afternoon to speak with her. She claimed she had been cooperative with the detectives.

Jessica testified that on February 2 she saw appellant for the first time at 9:30 to 10:00 p.m. She stated that although she had told the detectives that appellant and Joel came to her home at 4:30 p.m. that day, she had been nervous, and that appellant could not have come at that hour because she worked both days each weekend. She claimed she had not told the detectives that she had plans to see appellant later that evening, that he never came, and that she left to go out with Jaime and Sebastian at 9:30 or 10:00 p.m. She acknowledged having spoken with the defense investigator on February 24, 2002, and denied having discussed her testimony with appellant when she saw him at county jail on February 23, 2002.

A tape recording of a conversation between Jessica and appellant at the county jail was played before the jury to impeach her testimony.

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6 The February 2 shooting occurred at approximately 10:00 p.m.

Detective Fournier, who interviewed Jessica on February 11, testified that she had told him appellant arrived at her house at 4:30 and left at 6:15 p.m., and that appellant failed to call although she was to meet with him later that night. Since appellant did not return, she went out with her sister and with Sebastian, her boyfriend. Jaime told the detective that appellant and Joel had been at her house for about an hour mid-evening and appellant failed to return later as he said he would. Detective Fournier characterized both sisters as nervous and uncooperative.

Detective Tomlin testified that one of appellant's sisters told him that when she returned home on February 1 at 7 p.m., appellant was already there. Appellant's barber had told Tomlin that he began cutting appellant's hair at 6:30 p.m. on February 1 and that a haircut took a half hour.

DISCUSSION

I. The erroneous admission of the dog scent evidence does not require reversal.

Defense counsel challenged the introduction of the dog scent evidence. An Evidence Code section 402 hearing was conducted at which Edward Hamm testified that he was a civilian contractor with the Sheriff's Department who handled bloodhounds to provide investigative services. He had attended and taught seminars on the subject of dog scent investigation. He explained how a dog is trained to track human scent. He had been involved in the training of the bloodhound Knight and had been his handler for two years before the instant investigation. Out of 140 criminal investigations in which Hamm had used Knight, Knight had successfully tracked in 32 cases, meaning that his work was confirmed by evidence found on the trail, witness statements, or convictions. Hamm had received no indication in the remaining cases whether or not Knight's work had been successful.

When Hamm was called to the scene on February 7, 2002, he was not given any information other than where the crime had occurred. Detectives provided him with a gauze scent pad that allegedly had the suspect's scent on it. The pad was in a double sealed plastic bag and he removed the pad himself. He had no knowledge of how the gauze pad had been retrieved or handled before he received it. He provided the scent pad

to Knight and gave the dog the command to find and follow a scent. Knight led him on a route that ended at a location where detectives later told him a witness had seen a possible suspect entering a vehicle. Knight's reaction was consistent with a scent being present on the scent pad that matched the scent or correlated with the trial he followed.

On cross-examination during the Evidence Code section 402 hearing, Hamm acknowledged that there were no scientific studies on what scent is or on how dogs are able to follow scent. Hamm had no educational background with respect to working with dogs following scent trails, and no such courses exist. He had not received any professional training or education in the area of sensory function. As far as he knew, no scientific studies existed regarding success rates of dogs tracking scent or as to how long scent remains in one place. He testified that since dogs work the scent differently as the scent becomes older or weaker, one can estimate how old the scent is, and based on how Knight worked the scent he could state that the scent at the location where Knight stopped had not been there as long as four weeks, but he could not give an estimate of how many days it had been present. Based on his experience watching dogs respond to controlled scents, he stated that the scent had been present less than two weeks.

In arguing the issue, defense counsel stated that this was not a scent lineup case but "a simple trail case which is distinguishable," and he stated he was not going to use his expert, Mr. Myers, to raise a *Kelly-Frye* motion, although he believed this evidence should be subject to *Kelly-Frye*.[7] He argued that the foundational requirements had not

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[7] Under the "*Kelly-Frye*" doctrine, based on *Kelly*, *supra*, 17 Cal.3d 24 and on *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, the federal appellate court decision on which it relied, evidence obtained through a new scientific technique is admissible if its reliability is established under a three-pronged test. "First, there must be proof that the technique is considered reliable in the scientific community. Second, the witness testifying about the technique must be a qualified expert on the subject. Third, there must be proof that the person performing the test used correct scientific procedures." (*People v. Willis* (2004) 115 Cal.App.4th 379, 385 (*Willis*).) The United States Supreme Court subsequently held that *Frye* was superceded by the Federal Rules of Evidence, and the doctrine is now referred to as the *Kelly* rule. (*People v. Bolden* (2002) 29 Cal.4th 515, 545.)

been met since Hamm did not qualify as an expert, having no formal education on the subject, and Knight's record of 32 successful trackings was not reliable evidence to satisfy the foundational requirement. He also argued that Evidence Code section 352 precluded introduction of the evidence. The prosecutor argued that the foundational requirements set forth in *People v. Craig* (1978) 86 Cal.App.3d 905 (*Craig*) and *People v. Malgren* (1983) 139 Cal.App.3d 234 (*Malgren*) were satisfied.

The trial court rejected the Evidence Code section 352 argument. It further found that Hamm qualified as an expert and that the *Malgren* factors were established, observing that the circumstance that only 32 of Knight's investigations had been confirmed went to the weight, not the admissibility, of the evidence.

Appellant contends that the trial court erred in admitting evidence of Knight's performance in scenting a trail attributed to him by means of the dog scent pad because it was portrayed as a type of scientific evidence without adequate foundation. He argues that there was no evidentiary basis to support the prosecution's assertion that a dog can reliably discriminate between scents, and that no evidence was presented to establish that the scent discrimination technique is generally accepted as reliable by persons in the scientific community as is required by *Kelly*, *supra*, 17 Cal.3d 24. He asserts that his rights to a fair trial, due process, and to confront and cross-examine witnesses were thereby violated. Alternatively, he argues that the admission of this evidence violated Evidence Code section 352 because "it would undoubtedly mislead jurors to a false sense of certainty without any scientific basis." He claims that because of the erroneous admission of this evidence, reversal is required.

Apart from the fact that the constitutional claims are waived, since they were not raised in the trial court, this contention is unavailing. We need not decide whether the *Kelly* rule applies in this case, assuming that defense counsel preserved the issue for appellate review, since we conclude that the foundational requirements were not met. However, the erroneous admission of the evidence was nonprejudicial.

In *Willis*, *supra*, 115 Cal.App.4th 379, we observed, "Apart from the *Kelly* rule deficiency in this case, there is a foundational weakness in the dog identification

evidence. As has already been observed, '"dog trailing is a lot different from dog scent recognition.'" (*People v. Mitchell* [(2003)] 110 Cal.App.4th [772,] 790.) Testimony showing that a dog pursued a fleeing suspect to the site where he was hiding is a clear-cut case of dog tracking, and -- depending on the facts of each case--may be admissible. (See *People v. Malgren*[, *supra*,] 139 Cal.App.3d [at p.] 237-238, disapproved on other grounds in *People v. Jones* (1991) 53 Cal.3d 1115, 1144-1145 [allowing evidence that the defendant was tracked from the victims' house to some bushes less than one mile from the house, with the dog on the trail within a half hour of the incident]; and *People v. Craig*[, *supra*,] 86 Cal.App.3d [at p.] 910-911, 915-917 [allowing use of dog tracking evidence where the suspects were followed from their stolen getaway car to the point inside an apartment complex where they were detained]. . . ." (*Willis*, *supra*, at p. 386.)

However, as we pointed out in Willis, "A more difficult case is presented when the dog is not tracking a suspect but rather is given a scent from a gauze pad some length of time after an incident and is watched to see if the dog 'shows interest' in various locales frequented by the defendant. Showing interest in locations is a far cry from tracking a suspect and giving an unambiguous alert that the person has been located." (*Willis*, *supra*, 115 Cal.App.4th at p. 386.)

We concluded, "The prosecution cannot rely solely on anecdotes regarding the dog's capabilities. Instead, a foundation must be laid from academic or scientific sources regarding (a) how long scent remains on an object or at a location; (b) whether every person has a scent that is so unique that it provides an accurate basis for scent identification, such that it can be analogized to human DNA; (c) whether a particular breed of dog is characterized by acute powers of scent and discrimination; and (d) the adequacy of the certification procedures for scent identifications. (*People v. Mitchell*, *supra*, 110 Cal.App.4th at pp. 791-792.) None of these foundational requirements were met in this case." (*Willis*, *supra*, 115 Cal.App.4th at p. 386.)

Here, although the scent apparently came directly from appellant[8] rather than from objects found at the scene, as was the case in *Willis*, no adequate foundation based on academic or scientific sources was established. Unlike *Craig* and *Malgren*, the cases mentioned in *Willis* which permit dog tracking evidence under specified circumstances (*Willis*, *supra*, 115 Cal.4th at p. 386), the use of the dog here did not occur shortly after the crime, but five days later. In the absence of an adequate foundation from scientific or academic sources as to how long the scent would remain at the location, whether every person has a unique scent such as to permit an accurate basis for scent identification, the powers of the dog as to scent and discrimination, and the adequacy of the certification procedures for scent identifications (*ibid.*), the evidence was erroneously admitted in this case.

However, as in *Willis*, the erroneous admission of the evidence was nonprejudicial.[9] Appellant was identified by the three surviving victims of his attacks. The gang evidence supplied a compelling motive for the shootings, as well as for the victims' initial reluctance to identify him. The boots described by Nelson as having been worn by his assailant were found in appellant's sisters' home, where defense witnesses testified appellant had been on the night of the shooting, and appellant admitted having fired an S.K.S. assault rifle, a unique weapon whose use was associated with the shootings by the ballistics evidence. Appellant's claim that he learned of the shootings from his friend Luis Ramirez proved to be false. With respect to the dog scent evidence, Veronika Hayes heard gunshots and then saw two individuals, one with a gun, on the

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8 We observe that at the Evidence Code section 402 hearing, in contrast to the trial, Detective Fournier was not called to testify as to the preparation of the scent pad and Hamm testified that he did not know how the scent pad was prepared.

9 Although appellant claims that the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18) applies, the *Watson* standard of error (*People v. Watson* (1956) 46 Cal.2d 818, 836) was used in both *Willis*, *supra*, 115 Cal.App.4th at page 388, and *People v. Mitchell*, *supra*, 110 Cal.App.4th at page 795. As indicated above, the constitutional issues appellant now raises were waived.

night of the shooting of Wood and Nelson, but Knight did not lead Hamm to the location where she saw those individuals until five days later. Moreover, Hayes could not identify appellant as one of the people she saw. On this record, there is no reasonable probability that appellant would have been acquitted had the dog scent evidence been excluded.

II. Appellant's proposed instruction was properly refused.

Appellant contends that the trial court erred in refusing his special instruction on dog tracking evidence. Although we have determined that the dog scent evidence was erroneously admitted, we will consider this contention because it is raised as an independent ground for reversal. However, the contention lacks merit.

The trial court instructed the jury in accordance with CALJIC No. 2.16 on dog tracking evidence as follows: "Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is a perpetrator of the crime[s] of murder and attempted murder. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crimes charged. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of the crimes. [¶] The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking. [¶] In determining the weight to give dog tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question."

Defense counsel submitted a special instruction, purportedly based on *Malgren*, *supra*, 130 Cal.App.3d at p. 238 as follows: "Evidence of dog tracking has been received in this case. Said evidence should only be considered by you if you find each of the following factors to be present. [¶] 1. The dog's handler was qualified by training and experience to use the dog. [¶] 2. The dog was adequately trained in tracking humans. [¶] 3. The dog has been found to be reliable in tracking humans. [¶] 4. The dog was placed on the track where circumstances indicated the guilty party to have been. [¶] 5. The trail had not become stale or contaminated. [¶] You may only consider the evidence

of dog tracking if each of the foregoing five factors is shown to be true. If any factor was shown by the evidence not to be true, you are to disregard the dog tracking/trailing evidence received in this case."

Defense counsel argued that his special instruction was a more complete and correct statement of the law than was CALJIC No. 2.16 and asked that CALJIC No. 2.16 be modified to include the language he had submitted or that his instruction be given in conjunction with CALJIC No. 2.16. The trial court rejected the proffered instruction, stating that the issues set forth in the defense instruction had been resolved when the trial court ruled the evidence admissible but could be argued to the jury as going to the weight of the evidence.

Appellant contends that the trial court's refusal to give his requested special instruction violated various of his state and federal constitutional rights, as well as state statutory provisions governing the prosecution's burden of proof. He argues that his instruction was a pinpoint instruction which the trial court was obligated to give and that CALJIC No. 2.16 was not complete or accurate, in that it failed to inform the jury that a failure of proof on any factor necessarily undermined the integrity of the entire testimony.

In *Malgren*, *supra*, 139 Cal.App.3d at page 237, the court held that "evidence of the conduct of a dog who has trailed an accused . . . is admissible, provided a proper foundation is laid." The *Malgren* court held "that the following must be shown before dog trailing evidence is admissible: (1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated." (139 Cal.App.3d at p. 238.)

CALJIC No. 2.16 correctly stated the law set forth in *Malgren*. (*People v. Mitchell*, *supra*, 110 Cal.App.4th at p. 786, fn. 3.) It instructed the jury how to determine the weight to be given to the evidence admitted by the trial court, by considering the training, proficiency, experience and proven ability of the dog, the trainer, and the handler, as well as the circumstances of the procedure followed in this case. It also

admonished the jury that there must be some other evidence to support the accuracy of the identification evidence based on dog tracking. Appellant confuses the determinations to be made as to the admissibility of the evidence and as to its weight. The instruction submitted by the defense would have, in effect, given the jury the authority to determine the admissibility of the evidence, a matter for the trial court, not the jury. (*Malgren*, *supra*, 139 Cal.App.3d at p. 238.)

In addition, while a defendant is entitled, on request, to a proper pinpoint instruction, one which pinpoints the theory of the defense, the trial court may refuse instructions "that highlight '"specific evidence as such."'" This type of instruction "'invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence,' [and] is considered 'argumentative' and therefore should not be given. [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Such is the case here.

Having admitted the dog tracking evidence, the trial court did not err in refusing appellant's proposed instruction.

III. Evidence of appellant's firing of a weapon a year earlier was properly admitted.

When Detective Tomlin testified that he had asked appellant if he had ever fired a firearm and, if so, when was the last time he had done so, defense counsel asked to approach the bench. Counsel stated that since an S.K.S. rifle had been seized from appellant's home and retained by law enforcement prior to the shootings, the weapon was "not involved in this case." The prosecutor pointed out that he did not intend to introduce evidence that appellant had possessed the weapon, but that he wished to elicit testimony that appellant had fired an S.K.S. rifle a year earlier because "the relevance is he likes S.K.S. rifles." The prosecutor explained that that particular weapon is "a very specific gun" that is "handled a lot differently than just a regular semiautomatic weapon," so that appellant's familiarity with the weapon was highly probative. Defense counsel indicated that, in the interest of fairness and a just result, he wanted to be sure it was made clear that the weapon seized earlier was not involved in this case.

The trial court permitted the prosecutor to elicit the evidence of appellant's prior use of the rifle. Detective Tomlin further testified that the weapon was not a common

weapon and that its bullets and casings were unique. Defense counsel subsequently introduced testimony that two S.K.S. rifles were seized from appellant's residence during an unrelated investigation in November 2000 and that they were retained by the sheriff's department and not returned to appellant's family.

Appellant contends that the trial court erred in admitting evidence of his prior possession of the firearm, which was similar to one which may have been used in the instant crimes. He argues that the evidence was not relevant. He claims that it was tantamount to evidence of an uncharged crime, since the evidence permitted inference he was in illegal possession of weapon and had propensity to use it for illegal purposes, particularly where a search warrant was involved, and that the evidence was inadmissible under Evidence Code section 1101, subdivision (a). He further claims that this evidence had the potential for extreme prejudice, particularly when considered together with other erroneously admitted evidence. This contention is without merit.

We point out, preliminarily, that the prosecutor did not seek the introduction of evidence that appellant *possessed* any particular type of firearm, but only that appellant had *fired* an S.K.S. rifle a year earlier. Defense counsel, for tactical reasons, chose to bring out the evidence that two such rifles had been seized from appellant's family's residence prior to the charged crimes and had not been returned by law enforcement.

Appellant did not challenge the admissibility of this evidence in the trial court on Evidence Code section 1101 grounds at the time the evidence was admitted, and although he raised an Evidence Code section 1101 issue in his motion for new trial, he did not obtain any ruling on that ground. Any complaint that the admission of evidence violated that provision is waived. (*People v. Clark* (1992) 3 Cal.4th 41, 125-126; *People v. Pinholster* (1992) 1 Cal.4th 865, 931.) Moreover, as discussed below, appellant's argument that the jury could view this as propensity evidence because the fact that S.K.S. rifles were seized indicated potential illegality is attributable to his own introduction of the evidence.

The trial court has broad discretion in determining the relevance of evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 727.) The relatively unique 7.62 caliber casings

and live bullet, which likely came from an S.K.S. rifle, were recovered from the scene of the shooting of Wood and Nelson and from Wood's body. The evidence that appellant had familiarity with such a unique weapon was relevant to establish the identity of the shooter.

To the extent defense counsel raised an Evidence Code section 352[10] issue, the trial court similarly has broad discretion in ruling on the admissibility of evidence under Evidence Code section 352. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) Evidence is prejudicial within the meaning of Evidence Code section 352 if it "'"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*Kipp*, *supra*, at p. 1121.) The evidence that appellant had fired an S.K.S. rifle, which was a unique weapon, had strong probative value given the recovery of casings that very likely had been fired from such a weapon at the scene of one of the shootings as well as the recovery of a bullet likely fired from such a weapon from the body of the murder victim, and the evidence that appellant had fired such a weapon was neither unduly prejudicial nor more prejudicial than probative. No abuse of discretion appears here.

Since it was the defense that elicited evidence that two S.K.S. rifles had been seized from appellant's residence in November 2000, presumably to demonstrate that after their seizure they had not been returned to appellant's family, appellant cannot be heard to complain on appeal of its introduction or its potentially prejudicial effect. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1168.)

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10 Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

IV. The trial court properly permitted impeachment of Danny Gutierrez with his prior conviction for shooting at an inhabited dwelling.

Defense witness Danny Gutierrez testified for the defense, establishing that appellant was at his sister's house between 7:30 and approximately 9:30 p.m. on February 2, 2002. Defense counsel sought to limit impeachment with Danny's 1998 conviction for shooting at an inhabited dwelling by sanitizing it to reflect only "a crime of moral turpitude." The trial court rejected this request. During his testimony on appellant's behalf, Danny acknowledged that several years earlier he had sustained the prior conviction for shooting at an inhabited dwelling. In response to further questioning by defense counsel, he testified that he served a prison term for that conviction, was released from prison and discharged from parole, and was now employed and attending college. The prosecutor, in cross-examining Danny, elicited his testimony that he had sustained the conviction for shooting at an inhabited dwelling in 1998 and that he had gone to prison for the conviction.

Appellant contends that the trial court erred in failing to sanitize Danny's prior conviction. He argues that admitting evidence of the nature of the witness's prior conviction and of the fact he had served prison time resulted in the denial of a fair trial, because Danny's prior conviction was similar to the charges for which appellant was on trial and the evidence had little probative value beyond the mere fact that the witness had suffered a prior felony conviction, while serving to inflame the jury against appellant because of his association with violent persons. This contention is without merit.

Danny's prior conviction was a crime of moral turpitude. (*People v. White* (1992) 4 Cal.App.4th 1299, 1304-1305.) While a trial court may sanitize a prior conviction introduced for impeachment purposes, it is not required to do so, and there was no abuse of discretion here. Danny was not alleged to have had anything to do with the charged offenses. The impeachment prior was not the same crime as the offenses charged against appellant, and even the defendant himself may be impeached with evidence of a prior conviction that is similar or identical to the charge on which he is being tried. (*People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297-1298.)

We observe that it was defense counsel, not the prosecutor, who first brought out the fact that Danny had served prison time for the conviction, apparently in an effort to portray the witness as a person who had put his criminal past behind him to lead an upstanding life (see *People v. Shea* (1995) 39 Cal.App.4th 1257, 1266), and thus he cannot complain of its admission. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1168.)

Moreover, any possible error in the admission of the evidence of the nature of Danny's prior conviction would be utterly harmless. The trial court instructed the jury that it could consider the witnesses' prior convictions solely to determine their credibility, thus minimizing the possibility of prejudice. The jury is presumed to have followed the trial court's instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) In addition, as indicated, Danny was not alleged to have been involved with appellant in the charged shootings, and his alibi testimony was cumulative to that of other witnesses. There is no reasonable probability of a more favorable outcome had Danny's prior conviction been sanitized. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

V. Admission of the jailhouse conversation does not require reversal.

During Jessica Cherry's rebuttal testimony, she indicated, among other things, that she had been cooperative with detectives during her interview, that she did not say "fuck you" when they came to her door, and that although she visited appellant in county jail, she had not discussed her testimony with appellant. The prosecutor sought to impeach her by means of a seven-minute conversation between Jessica and appellant that was tape recorded at county jail on February 23, 2002. Defense counsel objected that he had never heard the tape nor seen the transcript that had been prepared. The trial court overruled the objection and the tape was played before the jury.

After the tape was played, before defense counsel commenced his cross-examination of Jessica, he again objected to the admission of the taped conversation and raised specific objections, including the following: (1) Jessica's statement that Detective Fournier had told her he had successfully handled a murder case, together with her statement that the murder victim had been her boyfriend, was not inconsistent with her testimony and was prejudicial in that it associated her with gang violence. (2) Her

statement that Danny Gutierrez had provided her with information about the case was not proper impeachment and inadmissible hearsay. (3) Appellant's description of his discussions with other inmates, some of whom had nicknames that suggested they were gang members, constituted inadmissible character evidence and improper impeachment. (4) Appellant's discussion of his no-bail status constituted inadmissible character evidence and improper impeachment. (5) Jessica's discussion of her conduct at her work place, where she obtained a commission by substituting her employment number for that of another employee who had claimed her sale, was improper character evidence and improper impeachment.

Defense counsel further objected that the tape-recorded conversation constituted improper rebuttal, contained hearsay and irrelevant evidence, and denied appellant due process. He asserted that the prosecutor had "choreographed" Jessica's direct examination to elicit inconsistencies on minor facts to permit impeachment with highly inflammatory evidence. The prosecutor argued that the conversation constituted proper impeachment since "the entire conversation . . . goes towards credibility. And also it impeaches her in the areas that I had the opportunity to ask her about that she denied. But the . . . jury has to determine the credibility of this witness based on her answers that she gave and based on how her story changed from when she was interviewed by the detectives in this case, to when she was interviewed by defense investigator. . . . [¶] This can give them certain input and insights on what took place on February 1st and 2nd and whether or not this witness is being truthful. [¶] It should not be redacted. There is nothing in here that we feel is so prejudicial to Ms. Cherry or the defendant that would warrant a redaction." The prosecutor further argued that redaction of a portion of the tape would cause speculation about what actually occurred in the conversation.

The trial court denied defense counsel's motion for mistrial and overruled his objections. The trial court found that many of the parts of the conversation about which counsel complained were properly admitted as impeachment, and indicated that, other than the discussion of the incident at Jessica's employment, "overall . . . there was justification for all of those entries and warranted under the Evidence Code." As to the

statements about of the incident at Jessica's employment, the trial court stated that it was not "of sufficient consequence" to give a limiting instruction, but instructed the prosecutor not to argue the matter.

In a motion for new trial, defense counsel argued on several grounds that admission of the contents of the tape-recorded conversation was erroneous and prejudicial, in part because it included obscenities uttered by both appellant and Jessica and included statements about attorney fees,[11] which defense counsel claimed made counsel look like a "'hired gun.'" The trial court denied the motion for new trial.

Appellant acknowledges that portions of the conversation were properly admitted to impeach Jessica's claim that she had not used profanity and that she had not spoken to appellant about the case, but he complains that the remainder of the conversation was intended merely to prejudice him before the jury. Appellant points to Jessica's mention of hearsay statements by Detective Fournier indicating that "everybody says it's Jose," in addition to the statements set forth above. He contends that the admission of the objected-to portions of the taped conversation constituted prejudicial error because they constituted inadmissible hearsay or irrelevant and highly prejudicial material and were improper rebuttal evidence, and that the admission of this evidence denied him due process. Appellant's contention is unavailing.

Jessica was on the list of potential defense witnesses; defense counsel chose not to call her to testify. She was properly called as a rebuttal witness for the purpose of rebutting defense evidence that appellant was at her residence at the time of the shootings on February 2, 2002. (*People v. Mayfield* (1997) 14 Cal.4th 668, 761.) Many of the challenged portions of her jailhouse conversation were relevant to impeach her testimony as to significant matters. She testified that her conversation with Detective Fournier was cooperative, while her statements indicated that she was not; she denied being best friends with appellant, but in her conversation she stated that she was, an indication of

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11 Jessica asked appellant if he had an attorney, and appellant replied, "Yeah . . . my family came out the pocket . . . ."

bias; and she denied having spoken to appellant about his case, but a good deal of the jailhouse conversation, including her statements about what she had been told by Danny Gutierrez, demonstrated that she did discuss the case with appellant.

It certainly would have been the better practice for the trial court to have permitted defense counsel to listen to the tape and argue his objections, and to have considered redactions of any portions that were not relevant for impeachment or that tended to be prejudicial, before the tape was heard by the jury. However, we conclude that reversal is not warranted. The jury was aware that appellant was a gang member and that individuals he was friends with, including Danny Gutierrez, had criminal records and likely were gang members as well. In the conversation, appellant never acknowledged his guilt, and he stated that he was confident that he would be out of jail within a year. Jessica herself was impeached as to matters of greater consequence to the issues at trial than anything arising from her conduct at work. Considering the contents of the conversation in relation to the remainder of the evidence before the jury, appellant was not prejudiced by the admission of the taped conversation. In view of the strong evidence of appellant's guilt (see part I, *ante*), the playing of the tape-recorded conversation cannot be said to have affected the outcome of this trial even under the *Chapman* standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

VI. Imposition of an enhancement on the murder count for discharge of a firearm pursuant to section 12022.53, subdivision (d) does not violate section 654 or the merger doctrine.

The trial court sentenced appellant to 15 years to life for the murder of Wood and imposed a 25-year-to-life enhancement on that count pursuant to section 12022.53, subdivision (d) for the personal discharge of a firearm causing death. Appellant contends that imposition of the enhancement violates section 654 and the merger doctrine,[12]

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12 Section 654 provides, in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

because the predicate facts and requisite elements establishing his guilt of murder accomplished by use of a firearm necessarily included his conduct in intentionally discharging the firearm and causing Wood's death.

This contention was rejected in *People v. Sanders* (2003) 111 Cal.App.4th 1371, where Division Five of this court held that the merger doctrine is inapplicable in this situation and that section 654 does not preclude imposition of the section 12022.53, subdivision (d) firearm use enhancement. (*Id*. at pp. 1374-1376.) We agree with the analysis in *Sanders* and see no reason to either repeat it here or to depart from it.

VII. Imposition of the 10-year criminal street gang enhancements was erroneous.

As respondent concedes, the trial court erroneously imposed 10-year criminal street gang enhancements for the attempted murders of Nelson, Saleem, and Engle in counts 2 through 4.[13] Since each of the willful, deliberate and premeditated attempted murders was punishable with a term of life in prison, the 10-year term for violent felonies prescribed in section 186.22, subdivision (b)(1) is inapplicable, and section 186.22, subdivision (b)(5) mandates that as to each count, appellant "shall not be paroled until a minimum of 15 calendar years have been served." (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239.)

Under the merger doctrine, the felony-murder rule may not be applied where the predicate felony is assault and where the assault is an integral part of the homicide and is in fact included in the charged offense, because to do so would relieve the prosecution of the requirement that it prove malice. (*People v. Ireland* (1969) 70 Cal.2d 522, 538-540.)

[13] Although appellant appears to make this claim as to the murder count as well, the criminal street gang allegation was found not true as to the murder and no criminal street gang enhancement was imposed on that count. In addition, contrary to appellant's assertion, the amendments to section 186.22 resulting from Proposition 21 apply in his case, since his offenses occurred in 2002, long after the March 2000 effective date of the amendments.

DISPOSITION

The judgment is modified to strike the 10-year criminal street gang enhancements under section 186.22 in counts 2, 3, and 4, and, as to each of these counts, to reflect a minimum parole eligibility of 15 years. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P.J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST